STATE OF MICHIGAN

COURT OF APPEALS

ANDEBERHAN ALMEDON, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED May 29, 2003
v	No. 242828 WCAC
HERMAN MILLER, INC., and TRAVELERS INDEMNITY COMPANY, Defendants-Appellees/Cross-Appellants.	LC No. 99-000126

Before: Bandstra, P.J., and Gage and Schuette, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for consideration as on leave granted in accordance with *Maier v General Telephone Co*, 247 Mich App 655; 637 NW2d 263 (2001).[1] Plaintiff appeals and defendant cross appeals a decision of the Worker's Compensation Appellate Commission (WCAC) denying plaintiff worker's compensation benefits on the ground that he established a new wage-earning capacity in reasonable employment. We affirm.

I. FACTS

Plaintiff worked for defendant as a production worker. His job required him to lift up to fifty pounds. On July 10, 1990 plaintiff felt pain in his low back while lifting a skid, and in September 1990 he fell and landed on his buttocks at work. He missed no time from work due to either incident. However, his back pain increased after September 1990. In February of 1991 plaintiff underwent surgery to repair a ruptured disc. He returned to work in May of 1991 with restrictions against excessive lifting, bending, or twisting. He was assigned to a job known as the height strip job. This job required him to inspect, refurbish, and pack light plastic strips in boxes. Plaintiff was able to adjust the height of the table at which he worked, and could sit or stand at his option. The production rate for the job was 265 parts per eight-hour shift. On

[1] In that case another panel of this Court held that the statutory presumption contained in MCL 418.301(5)(d)(i), § 301(5)(d)(i) of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, that a disabled employee who has accepted reasonable employment and who has continued in that employment for 250 weeks or more is presumed to have established a new wage-earning capacity, is a rebuttable rather than a conclusive presumption.

January 27, 1994, plaintiff slipped on ice in defendant's parking lot. He felt increased back and leg pain, but continued to perform the height strip job without interruption. In 1997 the production rate for the height strip job increased to 375 parts per eight-hour shift. Plaintiff was unable to increase his output and defendant terminated his employment on February 19, 1998.

Plaintiff sought worker's compensation benefits. He claimed injury dates of July 10, 1990, September 1990, January 27, 1994 and February 19, 1998 (last day worked) and disability due to low back pain. Dr. Lundeen, plaintiff's family physician, opined that plaintiff's work activities through his last day of work significantly aggravated his underlying condition. Plaintiff's surgeon opined that plaintiff's work activities played a significant role in the development of his herniated disc and stated that he required restrictions against excessive lifting. An independent physician found no objective signs of disability.

The magistrate awarded plaintiff continuing benefits. The magistrate found that plaintiff sustained work-related injuries on July 10, 1990, in September 1990 and on January 27, 1994, and that the 1994 injury resulted in a substantial aggravation of his underlying condition. The magistrate concluded that plaintiff sustained a work-related injury on February 19, 1998 and that he was totally disabled after that date.

In a two-to-one decision the WCAC affirmed the magistrate's decision in part, reversed it in part and remanded for clarification of the record. The majority found that sufficient evidence supported the magistrate's finding that plaintiff sustained work-related injuries on July 10, 1990 and in September 1990, but remanded for clarification of the magistrate's findings regarding injury dates of January 27, 1994 and February 19, 1998, stating that the vagueness of those findings required it to engage in impermissible speculation regarding the facts and legal reasoning employed by the magistrate. The majority reversed the magistrate's finding that plaintiff was totally disabled, emphasizing that the evidence did not show that plaintiff was unable to perform all work suitable to his training and qualifications.

In an opinion on remand, the magistrate[2] relied on plaintiff's testimony that his back pain increased after he fell on January 27, 1994 as support for the finding that the injury plaintiff sustained on that date aggravated his underlying condition. Plaintiff's and Dr. Lundeen's testimony supported the finding that plaintiff's back pain increased when he attempted to meet the increased production requirements of the height strip job, and his inability to continue working after February 19, 1998 supported a finding that he sustained an injury on that date.

In a decision after remand, the WCAC found that the magistrate's opinion on remand was deficient as a matter of law in that it did not contain independent findings, analysis, and judgment as required by MCL 418.847(2). The WCAC remanded the case a second time for clarification as ordered in its original decision.

In an opinion on second remand, the magistrate concluded that plaintiff was not entitled to worker's compensation benefits. No objective medical evidence demonstrated that plaintiff's fall on January 27, 1994 resulted in a pathological change in his condition, that his attempt to

[2] A different magistrate took over the case after the original magistrate retired.

increase his work pace resulted in an aggravation of his underlying condition, or that he suffered an injury on February 19, 1998. The magistrate found that the evidence, particularly plaintiff's testimony that his pain had not increased substantially since his 1991 surgery, supported a finding that the symptoms he experienced were merely manifestations of his 1990 injuries and his 1991 surgery.

The WCAC affirmed the magistrate's decision on second remand. The WCAC concluded that the magistrate's findings were supported by the requisite evidence, MCL 418.861a(3), and found that plaintiff was not entitled to benefits because he worked for more than 250 weeks at the height strip job after his last injury in 1990 and established a new wage-earning capacity in that position. MCL 418.301(5)(d)(i).

Plaintiff sought leave to appeal the WCAC's decision after second remand to this Court; another panel of this Court denied the application for lack of merit in the grounds presented. Plaintiff sought leave to appeal to our Supreme Court. In lieu of granting leave to appeal, our Supreme Court remanded the case for consideration as on leave granted in light of *Maier*, *supra*. Our Supreme Court denied leave to appeal in all other respects.

II. STANDARD OF REVIEW

The WCAC does not review a magistrate's decision de novo; nevertheless, it must undertake both a qualitative and quantitative analysis of the evidence to ensure a full, thorough and fair review. MCL 418.861a(13); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000). The WCAC is required to determine whether the magistrate's findings were supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3); *Mattison v Pontiac Osteopathic Hosp*, 242 Mich App 664, 670; 620 NW2d 313 (2000). If the WCAC finds that the magistrate did not rely on competent evidence, it may then make its own independent findings of fact. However, the WCAC may not substitute its judgment for that of the magistrate if substantial evidence exists to support the magistrate's decision. *Mudel*, *supra*, 699-700.

Judicial review begins with the WCAC's decision, *id*., 709, and does not extend to a review of the magistrate's decision. *Mattison*, *supra*. The WCAC's findings are conclusive if there is any competent evidence to support them. If it appears that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the magistrate's decision and did not misapprehend or grossly misapply the substantial evidence standard, the judicial tendency should be to affirm the WCAC's decision. *Mudel*, *supra*, 702-703, 706, 709. We review a question of law raised by a final order of the WCAC on a de novo basis. *Oxley v Dep't of Military Affairs*, 460 Mich 536, 540-541; 597 NW2d 89 (1999).

III. ANALYSIS

On appeal, plaintiff argues that the WCAC erred in finding that he established a new wage-earning capacity in the height strip job and addresses defendant's argument on cross-appeal that he cannot be considered disabled under the standard for compensable disability set

out in *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002).[3] In addition, plaintiff raises all the issues previously raised in his application for leave to appeal the WCAC's decision after second remand. Our Supreme Court and another panel of this Court denied leave to appeal on those issues, and thus found them to be without merit. The law of the case doctrine precludes reconsideration of those issues. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

Plaintiff argues that the WCAC erred by denying benefits on the ground that the height strip job constituted reasonable employment in which he established a new wage-earning capacity. We disagree and affirm the WCAC's decision after second remand. "Reasonable employment" constitutes "work that is within the employee's capacity to perform that poses no clear and proximate threat to the employee's health and safety and that is within a reasonable distance from that employee's residence." MCL 418.301(9). When an employer offers an injured employee work that is within the employee's capacity to perform notwithstanding limitations caused by an injury, the employer has made an offer of reasonable employment. An employer need not create a new position or a make-work position in order to offer an injured employee reasonable employment. An offer of reasonable employment can be an offer of a job regularly performed in the course of the employer's business, as long as the job is within the injured employee's capacity to perform. An employee who has accepted reasonable employment and who has continued in such work for 250 weeks or more is presumed to have established a new wage-earning capacity. MCL 418.301(5)(d)(i). This statutory presumption is a rebuttable rather than a conclusive presumption. *Maier*, *supra*, 662-664.

Contrary to plaintiff's assertion, the WCAC did not merely apply the presumption created by MCL 418.301(5)(d)(i) to the undisputed evidence that he performed the height strip job for 250 weeks or more. The WCAC examined the record evidence and found as fact that plaintiff established a new wage-earning capacity in the height strip job, a job regularly performed in the course of defendant's business. Plaintiff performed the job for several years without additional restrictions and became unable to do the job to defendant's satisfaction only after the expected production rate was increased. The WCAC's factual findings were supported by the requisite evidence and thus are conclusive. *Mudel*, *supra*, 706. The WCAC's factual determination, based on the record evidence, that plaintiff established a new wage-earning capacity makes a remand for further factfinding unnecessary. Cf. *Maier*, *supra*, 665. The WCAC correctly denied plaintiff worker's compensation benefits on this basis. MCL 418.301(5)(d)(i).

Our affirmance of the WCAC's decision on second remand denying plaintiff benefits

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[3] *Sington*, *supra*, holds that an employee is disabled if a work-related injury results in a reduction of the employee's maximum reasonable wage-earning capacity in work suitable to his training and qualifications. An injury that renders an employee unable to perform a job paying the maximum salary but leaves him able to perform an equally well-paying position suitable to his training and qualifications does not constitute a disability. *Id*., 155. On cross appeal, defendant argues that if we conclude that the WCAC erred by finding that plaintiff established a new wage-earning capacity in the height strip job, we must remand this matter to the WCAC for reconsideration in light of *Sington*, *supra*.

makes a remand for reconsideration in light of *Sington*, *supra*, unnecessary.

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Bill Schuette